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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 508

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff and Respondent,

vs.

EWELL C. QUALLS,
Defendant and Petitioner.

REPLY BRIEF BY PETITIONER

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1. Respondent in its brief has been eminently fair in its presentation of the issues involved in this case. It is important to note that Michigan law does not provide for a Court to take a motion for acquittal under advisement. This is likewise true of the Federal Courts. See Rule 29 of Federal Criminal Procedure. Section 27.1461 Michigan Statutes Ann. reads as follows:

> Hereafter in all civil actions at law, in courts of record if the defendant at the close of plaintiff's case or either party shall at the close of the testimony, and before the case is submitted to the jury, request the court for a directed verdict in his favor, the Court may reserve his decision thereon, and

submit the case to the jury under proper instructions as to the law applicable to the case.

Rule 785.1 of the Michigan General Court Rules provides as follows:

> The provisions of the Rule of Civil Procedure shall apply in criminal cases, except as otherwise provided by rule and statute and except when it clearly appears that they apply to civil actions only, or where statute or special court rule provide a different procedure.

The trial judge at the time he took such motion for acquittal under advisement was doubtful as to his power to do so. (P. 15 of Petitioner's Brief). The Michigan Court of Appeals in its opinion cited the case of *People v. Barlow*, 134 Mich. 394 as one in point. (P. 31 of Petitioner's Brief). In that case a motion for acquittal was denied and the decision therein is in harmony with those cited by respondent in its brief. Furthermore the Supreme Court found "In our opinion, there was a prima facie case made out by the people." We have then a situation in the case at bar where the trial judge in violation of Michigan law took a motion for acquittal under advisement and at the time when the Michigan Court of Appeals was of the opinion "The prosecution had not conclusively demonstrated the presence of provocation". (P. 31 Petitioner's Brief).

Does such act constitute a violation of the Fifth Amendment protection against self incrimination? Did such practice place a penalty on the exercise of a person's right accorded him by the Fifth Amendment? It would seem, however, that these questions can be answered by a determination as to whether at the close of the People's case there was a triable issue to be submitted to the jury.

In the case of *U.S. v. Rosengarten,* 357 Fed. (2) 466 the Court found that the Government's case in chief at the time the defendant made a motion for acquittal was sufficient to support defendant's conviction beyond reasonable doubt. Also see *U.S. v. Moore,* 375 Fed. (2) 877 where it was held:

> "There is respectable authority, however, holding that there is no prejudicial error in the trial court's reserving ruling on defendant's motion for judgment at the end of the Government's case where evidence at the time the motion was made suffices to present a jury question as to defendant's guilt."

On the other hand in case of *Jackson v. U.S.,* 250 Fed. (2) 901 the issue of self incrimination is inferred in the decision rendered therein:

> "The reservation to a defendant of the right to offer testimony after the denial of a motion for acquittal made at the close of the Government's case would be a futile thing if the Court could reserve its ruling and force the defendant to an election before resting and being deprived of the motion. The introduction of evidence after the denial of a motion at the close of the prosecution's case waives any error in the denial of the motion."

The case of *Cephus v. U.S.,* 324 Fed. (2) 896 contains this excerpt:

> "Grant of defendant's motion for acquittal at close of government's case is mandatory if the government's case is insufficient and trial judge has no discretion to reserve his ruling on the expectation that the defendant would testify." (Syllabus)

To summarize:

A. Where a motion for acquittal is denied a defendant who offers evidence subsequent thereto waives any claim as to the sufficiency of the Government's case;

B. Although a trial judge cannot take such motion for acquittal under advisement there is authority to the effect that the defendant does not waive any claim as to the sufficiency of the Government's case and should be acquitted if at the time such motion was reserved, the Government case in chief was not sufficient to support his conviction beyond reasonable doubt.

C. In the light of *Chapman v. California,* 386 U.S. 20 and *Spivak v. Klein,* 87 S. Ct. 626 a penalty was placed upon defendant's right against self incrimination in the case at bar by the reservation of such motion for acquittal.

2. Respondent in its brief contends that the trial judge conducted a proper investigation of the incident which occurred in the presence of a juror and cites *U.S. v. Miller,* 381 Fed. (2) 539 in support of such contention.

In that case the trial judge fully investigated the incident. It appeared that some one had talked to a juror about the case at a social gathering who in turn mentioned the incident to two other jurors. All three were questioned by the Court about the incident and whether it would affect the decision of any of the three. The opinion rendered in that case contains this citation:

> "The case is entirely different from *Remmer v. U.S.,* 347 U.S. 227, 74 S.Ct. 450, 98 L. Ed. 654 (1954) where the trial court apparently did not interview the juror and the record did not show what actually transpired as the later opinion made clear. 350 U.S. 379, 380, 76 S. Ct. at 427. It was the paucity

> of information relating to the entire situation coupled with the presumption which attaches to the kind of facts alleged that made manifest the need for a full hearing."

In the case at bar the juror in question was never questioned; the facts were never revealed to the jury. No proper investigation was made of the incident by the trial judge. His failure to do so constituted defendant's denial of a trial by an impartial jury.

3. Respondent in its brief admits that the *Miranda* decision of this Court was applicable at the time of interrogation and in effect that defendant's demand for the presence of an attorney should have been heeded by the arresting officers and any subsequent interrogation of him by them was illegal. It promises in the future to avoid such conduct. The cases cited by respondent are not in point.

In the case of *U.S. v. Fisher,* 387 Fed. (2) 169 the defendant was not under arrest. *Santoro v. U.S.,* 388 Fed. (2) 113 is not in point and contains this excerpt:

> *Escobedo v. State of Illinois,* 378 U.S. 478, 84 S.C. 1758, 12 L.Ed. 2nd 977 (1964) was decided before this case was tried, so the principle announced therein applies to this case. *Miranda v. State of Arizona,* 384 U.S. 436, 86 S.C. 1602, 16 L.Ed. (2) 694 (1966) was decided after this case was tried, and hence its principle does not apply.

Consequently in the light of *Miranda* the statements made by defendant to a police officer while in custody at the time he demanded to be represented by counsel were improperly admitted in evidence.

The petition for a writ of certiorari should be granted by this Court.

Respectfully submitted,

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